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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 NICLAS FOSTER, as Personal  
11 Representative of the Estate of MEIKE  
FOSTER,

12 Plaintiff,

13 v.

14 AMERICAN HONDA MOTOR  
15 COMPANY, INC., a foreign corporation, et  
16 al.,

17 Defendants.

Case No. C17-1727 RSM

ORDER RE: EVIDENTIARY HEARING  
REGARDING SIMILAR INCIDENTS

18 This matter comes before the Court on the parties' request for an evidentiary hearing and  
19 significant briefing on what is construed as early motions in limine to address the admissibility  
20 of similar car fire incidents involving the vehicle model in question in this case, a 2014 Honda  
21 CR-V, and to address the admissibility of testimony from survivors of similar car fires. *See*  
22 Dkts. #49, #51, #61, #63, and #65.

24 When a plaintiff attempts to introduce evidence of other incidences or accidents as direct  
25 proof of a design defect or causation in a products liability case, he or she has the burden of  
26 establishing "substantial similarity" between the other incidents and the incident at issue.  
27 *Daniel v. Coleman Co. Inc.*, 599 F.3d 1045, 1048 (9th Cir. 2010); *Cooper v. Firestone Tire &*  
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1 *Rubber*, 945 F.2d 1103, 1005 (9th Cir. 1991). The rule rests on the concern that evidence of  
2 dissimilar accidents lacks the relevance required for admissibility under FRE 401 and 402.  
3 *Cooper* at 1105. Minor or immaterial dissimilarity does not prevent admissibility. *White v.*  
4 *Ford Motor Co.*, 312 F.3d 998, 1009 (9th Cir. 2002).

5 Defendants argue that for other incidents to be offered to show causation, the proponent  
6 of the evidence must demonstrate a “high degree of similarity.” *See Eisenbise v. Crown*  
7 *Equipment Corp.*, 260 F.Supp.3d 1250, 1265 (S.D. Cal. 2017). Plaintiff argues that the  
8 requirement for substantial similarity should be relaxed when the evidence of other accidents is  
9 only submitted to prove notice or awareness of the potential defect as opposed to trying to prove  
10 the existence of the dangerous condition. *See Pau v. Yosemite Park and Curry Co.*, 928 F.2d  
11 880, 889 (9th Cir. 1991).

12 For clarity, the Court will consider the incidents at issue as described by Plaintiff’s  
13 expert witness. Both parties refer to the incidents as they are listed by Mr. Arendt. From an  
14 original 60 incidents of spontaneous fire in 2012–2016 Honda CR-Vs produced by Defendants,  
15 Mr. Arendt created a list of 17 incidents “that he considers substantially similar to the Foster  
16 fire.” Dkt. #51 at 4; *see also* Dkt. #53-5 (table of 17 incidents).

17 The Court agrees with Plaintiff that those incidents occurring substantially prior to the  
18 Foster fire arguably show notice or awareness of the potential defect and that this serves as an  
19 additional reason to admit into evidence. The Foster fire occurred the day before Thanksgiving  
20 2014. Arendt Incidents 1–4 occurred substantially prior; incident 5 occurred only two weeks  
21 prior. *See* Dkt. #53-5.

22 As to those incidents occurring after the Foster fire, Plaintiff is essentially arguing that  
23 these incidents are helpful for showing causation. Plaintiff and Defendants have different  
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1 theories as to what caused the Foster fire and both theories will be presented to the jury.  
2 Defendants are free to argue that the evidence supports their theory and not Plaintiff's theory.

3       The Court has reviewed the incidents, the testimony of Mr. Arendt, and the briefing  
4 submitted by the parties and concludes that incidents 1, 3, 5 and 8 are substantially similar to  
5 the circumstances of the Foster fire as argued by Plaintiff and are therefore admissible. These  
6 incidents point to organic material trapped in roughly the same area of the vehicle at issue in  
7 this case as a potential source of fire. Defendants appear to concede that these incidents are the  
8 most likely candidates for substantial similarity, but argue that "it is undisputed that, unlike Ms.  
9 Foster's CR-V fire, fires #1, 3, 5, and 8 on Mr. Arndt's list did not involve vehicles parked off  
10 road over the top of organic debris on the ground." Dkt. #63 at 5. If these incidents involved  
11 vehicles parked off road over organic debris, they would not only be substantially similar they  
12 would be functionally identical; such is not required for admissibility. Defendants remaining  
13 arguments to exclude these incidents go to the weight of the evidence. The Court agrees with  
14 Defendants that little is known about the causes of the fire in incidents 2 and 4, that incidents 6,  
15 7 and 11 have evidence of organic material being the source of the fire, but this evidence is  
16 purely speculative, and that the remaining incidents do not adequately point to organic material  
17 as the source of the fire.

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19       Turning to the question of the admissibility of "evidence of emotional pain and suffering  
20 from survivors of similar incidents," the Court finds that this evidence is on its face more  
21 prejudicial than probative and that Plaintiff has failed to provide the Court with an adequate  
22 legal basis for its admissibility. The Court agrees with Defendants that *Wheeler v. John Deere*  
23 *Co.*, 862 F.2d 1404 (10th Cir. 1988) does not stand for the proposition that such testimony can  
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1 be offered to demonstrate the emotional pain and suffering of Ms. Foster in this case. *See* Dkt.  
2 #63 at 5–6. This evidence will be excluded under FRE 403.

3 Having reviewed the relevant briefing and the remainder of the record, the Court hereby  
4 finds and ORDERS that Arendt Incidents 1, 3, 5, and 8 are admissible for the reasons stated  
5 above. The remaining incidents cited by Plaintiffs are excluded under FRE 403. Evidence of  
6 emotional pain and suffering from survivors of similar incidents is excluded under FRE 403.  
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8 DATED this 21<sup>st</sup> day of November 2019.

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11 RICARDO S. MARTINEZ  
12 CHIEF UNITED STATES DISTRICT JUDGE  
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